

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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YUHURA McCRAY,

Petitioner,

-against-

ORDER

21-CV-0311 (JS)

DONITA McINTOSH,

Respondent.

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APPEARANCES

For Petitioner: Yuhura McCray, Pro Se
18-A-1791
Bare Hill Correctional Facility
Caller Box 20
181 Brand Road
Malone, New York 1295

For Respondent: No Appearance

SEYBERT, District Judge:

On January 14, 2021, Petitioner Yuhura McCray ("Petitioner") filed a petition, pro se, for habeas corpus relief pursuant to 28 U.S.C. § 2254 (see ECF No. 1), but did not pay the required five-dollar (\$5.00) filing fee. (See Case Docket, in toto.) Therefore, on January 19, 2021, a Notice of Deficiency (hereafter, "Notice") was issued, which advised Petitioner that he either needed to pay the \$5.00 filing fee or request to proceed in forma pauperis ("IFP"). (See Notice, ECF No. 2.) The Notice concluded with the warning:

If you decide to proceed with your action you must return the enclosed papers [i.e., the IFP

application] WITHIN 14 DAYS FROM THE DATE OF THIS NOTICE. If you do not comply[,] your case will not proceed and may be dismissed for failure to prosecute.

(Notice (emphasis added).) The Notice and IFP application were mailed to Petitioner on January 20, 2021.

To date, the Petitioner has not paid the \$5.00 filing fee or returned the IFP application requesting that he be granted permission to proceed without paying the required filing fee. (See Case Docket, in toto.) Therefore, he remains in noncompliance with Rule 3(a) of the Rules Governing Section 2254 Cases in the United States District Court (hereafter, "Rule 3(a)"), which states, in relevant part, that a Section 2254 petition:

must be accompanied by : (1) the applicable filing fee, or (2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.

Rule 3(a) (emphasis added).

Before dismissing a matter on its own initiative, the Court "must accord the parties fair notice and an opportunity to present their positions." Day v. McDonough, 547 U.S. 198, 210 (2006); see also Acosta v. Artuz, 221 F.3d 117, 124 (2d Cir. 2000) ("The long-standing general rule is that a court may not dismiss an action

without providing the adversely affected party with notice and an opportunity to be heard."). Here, Petitioner has already been provided notice that his Petition may be dismissed for failure to cure his deficiency of not paying the \$5.00 filing fee or not requesting to proceed IFP (in other words, the consequence for not complying with Rule 3(a), the applicable procedural rule governing Section 2254 petitions). (See Notice.) However, in consideration of Petitioner's pro se status and in an abundance of caution, the Court affords Petitioner a final opportunity to correct this shortcoming, especially as compliance with Rule 3(a) is mandatory.

Accordingly, IT IS ORDERED that, by no later than March 12, 2021, Petitioner is either to:

- (1) pay the \$5.00 filing fee; or
- (2) submit an IFP application (together with the required "certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution" (Rule 3(a)).

PETITIONER IS ON NOTICE: FAILURE TO TIMELY COMPLY WITH THIS ORDER WILL RESULT IN HIS SECTION 2254 PETITION BEING DISMISSED without prejudice.

IT IS FURTHER ORDERED that the Clerk of Court is to:

- (1) mail this Order to Petitioner at his address of record;

- (2) include an IFP application with said mailing; and
- (3) make the notation "LEGAL MAIL" on the mailing envelope.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: February 12, 2021
Central Islip, New York